IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

MARIO RODRIGUEZ Petitioner-Defendant v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent.	Case No. S272129 Sixth District Case No. H049016 Santa Clara County Case Nos. C1650275 and C1647395
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	

PETITIONER'S OPENING BRIEF ON THE MERITS

After Opinion by the Court of Appeal, Sixth Appellate District, Affirming the Denial of the Motion to Dismiss, by the Superior Court for Santa Clara County, the Honorable Eric S. Geffon, Presiding Judge

BRIAN C. McCOMAS
California SBN 273161
The Law Office of B.C. McComas, LLP
PMB 1605, 77 Van Ness Ave., Ste. 101
San Francisco, CA 94102
Telephone: (415) 814-2465
Facsimile: (415) 520-2310
lawofficeofb.c.mccomasllp@gmail.com

Attorney for Petitioner-Defendant
MARIO RODRIGUEZ
Appointment Via the Santa Clara
County Independent Defense Office

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TO: THE HONORABLE CHIEF JUSTICE, TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

ISSUE PRESENTED

Does an incompetency commitment end when a state hospital files a certificate of restoration to competency or when the trial court finds that defendant has been restored to competency?

SUMMARY OF ARGUMENTS PRESENTED

The commitment period ends by court finding because the committed person may never be transported or treated by the Department of State Hospitals ("DSH"). (Penal Code § 1370, subd. (b)(4); see also § 1370, subd. (a)(1)(G).) Court orders are required not only at the lapse of the statutory commitment period, but whenever the constitutional rule of reasonableness is violated. (§§ 1370, subds. (c)(1) and (d) and § 1385.) Even when a certificate of restored to competency is filed, the commitment period ends only upon court finding of restored, or not, to competence after "the

defendant [is] returned to court in accordance with Section 1372." (§ 1370, subd. (a)(1)(C).) The framework contemplates a court order after a hearing to determine "whether or not the defendant was found by the court to have recovered competence." (§ 1372, subd. (c).) If the certificate of restoration is approved, a court order after another hearing is needed to "determine whether the person is entitled to be admitted to bail or released on own recognizance status pending conclusion of the proceedings." (§ 1372, subd. (d).)

Without finding of restored to competence, much less opportunity for bail, petitioner, Mario Rodriguez, remains in the Santa Clara County Jail in violation of the statutory commitment period and his constitutional rights. He cannot personally assert those rights, nor challenge the continuing detention without court finding of restored, or not, to competence coinciding with the "jurisdictional" period of commitment that "cannot be waived by defendant or his counsel." (*In re Davis* (1973) 8 Cal.3d 798, 806.) His counsel may elect to challenge DSH's opinion within the "reasonable opportunity [that is] provided to do so." (*Id.* at p. 808.) But without court orders enforcing the statutory, constitutional, and jurisdictional limitations on petitioner's commitment, "the purpose of *determining or restoring* competence [cannot be limited] to no more than [two] years." (*Jackson v. Superior Court* (2017) 4 Cal.5th 96, 106, emphasis added.)

To date, three cases have diverged as to whether a court order or certificate of restored to competence ends the commitment period. (See *People v. Carr* (*"Carr II"*) (2021) 59 Cal.App.5th 1136; *Medina v. Superior Court* (2021) 65 Cal.App.5th 1197; and *Rodriguez v.*

Superior Court (2021) 70 Cal.App.5th 628.) In *Carr II* and *Medina*, the First and Fourth District Courts of Appeal agreed that a court order, "not a health official's certification of competency that initiates court proceedings to consider whether the defendant has regained competency, terminates the defendant's commitment." (*Carr II, supra,* 59 Cal.App.5th at p. 1140.) Those Courts of Appeal enforced statutory protections "made to assure that petitioners do not face an indefinite commitment without regard to the likelihood that they will eventually regain their competence, for such an indefinite commitment has been held to offend constitutional principles of equal protection and due process." (*In re Davis, supra,* 8 Cal.3d at p. 801.)

In *Rodriguez*, however, the superior court failed to find restored to competence within two-years of aggregated commitment time. The Court of Appeal for the Sixth District covered by retroactively terminating the commitment period to the filing date of the certificate to competence by the DSH. Erased were 431 days of commitment while petitioner was in "legal limbo" - unable to seek bail, personally assert fundamental rights, or challenge the criminal charges underlying his detention. No statute, constitutional provision, or Emergency Order justified the retroactive termination of his commitment period in lieu of court finding of restored, or not, to competency. (See generally, Gov. Code § 68115 [omitting §§ 1370 and 1372].)

The split in the law between *Carr II*, *Medina*, and *Rodriguez* is of critical importance for petitioner and the 1,500 or so persons committed to DSH facilities as "IST - PC 1370"; 1,500 or so wait-listed for beds; and unknown number of persons purportedly restored to

competence but awaiting to be so found in court on any given day.[1] The rights of these committed persons must be enforced by court orders to maintain statutory and constitutional "relation to the purpose for which the individual is committed." (*Jackson v. Indiana* (1972) 406 U.S. 715, 738.) Delegation of the powers to toll and terminate commitments to DSH by the lower courts, without statutory authority and in violation of fundamental rights, must be nullified. (*Smith v. Westerfield* (1891) 88 Cal. 374, 378-379; *Estate of Scarlata* (1961) 193 Cal. App. 2d 35, 39.)

In summary, ending the commitment period by DSH certificate is contrary to the evolution of the law over the last 100 years. (See, *infra*, § I.A.) This Court, and the Courts of Appeal in *Carr II* and *Medina,* correctly applied sections 1370 and 1372 to end the commitment period by court orders placing limits on the statutory and constitutional jurisdiction that protects committed persons. (See, *infra,* §§ I.B and II.C.) The lower courts failed to strictly, or reasonably, enforce these limitations by finding of restored, or not, to competence within the commitment period. (See, *infra,* §§ II.A-B and III.) Retroactively terminating the commitment period violated petitioner's fundamental rights during the COVID-19 Pandemic. (See, *infra,* §§ III.C and IV.) Remanding for strict application of the statutory and constitutional commitment period by way of dismissal and release, or perhaps refiling of charges or conservatorship, avoids

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[1] Department of State Hospitals (May 14, 2021) May Revision Proposals and Estimates, *State Hospital Populations*, § A3(a), at pp. 24, 28 available at: https://www.dsh.ca.gov/About_Us/docs/2021-22_May_Revision_ Estimate.pdf [last accessed April 1, 2022].)

"unfairness and possible harm that results from prolonged or indefinite commitment and [serves] the state's interest in bringing a defendant to trial with minimal delay." (*Carr v. Superior Court* ("*Carr I*") (2017) 11 Cal.App.5th 264, 270.)

STATEMENT OF THE CASE AND PROCEDURAL FACTS

In Case No. C1647395, petitioner is charged with criminal threats in violation of Penal Code section 422.[2] (Petition for Writ of Mandate, Exhibit 1, at pp. 4-6 [herein "Pet. Exhibit"].) In Case No. C1650275, petitioner is charged with assault with a deadly weapon, oral copulation by force, rape, criminal threats, and corporal injury to a spouse in violation of sections 245(a)(1), 288a, 261(a)(2), 422, and 273.5(a). (Pet. Exhibit 2, at pp. 8-11.) On December 16, 2016, he was held to answer to all charges.[3] (Return Exhibits 28 and 29.)

On December 27, 2017, the first doubt as to petitioner's competence was declared. (Pet. Exhibit 9; and Informal Response Exhibit 1 [herein "IR Exhibit"].) On May 3, 2018 - 127 days later - petitioner was found incompetent based on reports submitted by independently appointed doctors. (IR Exhibit 2.) On May 24, 2018, petitioner was committed without the capacity to consent to medication. (IR Exhibit 3.)

On September 7, 2018, DSH endorsed a certificate of restoration. (IR Exhibit 4.) On September 20, 2018, petitioner was

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[2] Further statutory references are to the Penal Code unless otherwise noted.

[3] Petitioner is charged by misdemeanor in Case No. C1898550, but lower court proceedings were stayed by this Court. A status conference is scheduled for July 2022.

found restored to competence (119 days after commitment). (IR Exhibit 5.) Thereafter, 112 days passed before a second doubt as to petitioner's competence was declared on January 10, 2019. (IR Exhibits 6 and 7.)

On April 18, 2019, petitioner was found not competent again. (IR Exhibits 8 and 9.) On May 16, 2019, he was committed to DSH. (IR Exhibits 10 and 11.) Transportation orders followed. (IR Exhibits 12 and 13.)

No hearings were held during the ensuing 238 days. (Pet. Exhibit 9.) On January 9, 2020, DSH-Atascadero filed a second certificate of restored to competence. (IR Exhibit 13.)

On January 24, 2020, petitioner was returned to court and counsel was substituted. (IR Exhibits 14 and 15.) Records were subpoenaed at the next hearing on February 7, 2020. (IR Exhibit 16.) On March 13, 2020, those records were released. (IR Exhibit 18.) The hearing was scheduled for April 17, 2020. (*Ibid.*) But the matter was continued and reset without appearance of counsel. (Pet. Exhibit 9.)

On July 17, 2020, further records were released and the matter was set for restoration to competence trial. (IR Exhibit 20.) The time estimate was two days. (*Ibid.*) On August 14, 2020, witnesses were ordered to appear via CCTV. (IR Exhibit 22 and Return Exhibit 32.) The matter was continued for subpoenaed records. (*Ibid.*) On August 28, 2020, however, no records were returned by DSH. (IR Exhibits 24 and 25.)

On September 11, 2020, records were released via subpoena. (IR Exhibit 26.) Trial was scheduled for November 2, 2020. (*Ibid.*) Thereafter, the matter was continued without hearings or appearance

of counsel. (Pet. Exhibit 10, at p. 102.) *There are no minute orders for 186 days*. (See Pet. Exhibit 9.) Eventually, a hearing was scheduled for April 5, 2021. (Pet. Exhibit 10, at p. 102.)

On January 19, 2021, the First District issued its opinion in *Carr II*. Petitioner's counsel moved to dismiss pursuant to section 1385 based on the violation of sections 1370, subdivision (c)(1); *Jackson, supra,* 4 Cal.5th 96; Article I, section 15 of the California Constitution; and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Pet. Exhibit 4, at p. 37; see also Pet. Exhibits 3 and 5.)

On or about March 1, 2021, the superior court advanced the hearing to March 16, 2021. (Pet. Exhibit 10, at p. 102.) By then, the two-year commitment period as calculated by counsel had elapsed after petitioner was committed without a finding of restored to competence for 789 days. (Pet. Exhibit 5, at p. 41.) Petitioner was placed on suicide watch the weekend before the hearing. (Pet. Exhibit 6, at p. 62.)

At the hearing on March 16, 2021, counsel argued that judicial orders control "the question of how to count days, *Carr* [*II*] is absolutely clear and the statute is clear." (Pet. Exhibit 6, at p. 60.) The prosecution argued: "Where the defendant has been found competent at the hearing, time is tolled back to that certificate of competency." (*Id.* at p. 57.) The Superior Court found:

> In *Carr [III]*, the hospital issues a certificate of restoration, basically, the declaration from the doctor at the hospital that this defendant is now restored.
>
> It's clear that that does not end the competency proceedings. The case has to come back for a hearing in

> front of a judge and the judge has to determine -- because we're not going to cede the judicial power, the judge has to determine if that defendant is, in fact, restored to competence. If the defendant is not restored to competence, as was the defendant in *Carr [III]*, then I think it makes all the sense in the world that every day up to that point counts as the time where the defendant is not competent, because the court is saying, 'I disagree with that certificate. That certificate was incorrect. The defendant is not restored,' which means the six months between the restoration certificate and the restoration hearing, that time is being timed where this defendant has been incompetent to stand trial, it should be counted against the maximum term.
>
> But if a restoration hearing happens and the court believes that actually the restoration certificate is correct and the defendant is restored, then I think it's fair to use the date of the restoration certificate as establishing the date on which the defendant was restored to competency.

(Pet. Exhibit 6, at p. 72.)

On April 16, 2021, petitioner filed a petition for writ of mandate or other equitable relief with the Sixth District Court of Appeal. (Case No. H049016.) A stay was granted on April 28, 2021. (*Ibid*.) Following order to show cause briefing, the Sixth District found that the filing of the certificate of restored to competence terminated the commitment period some 19 months prior on January 9, 2020. (*Rodriguez, supra,* 70 Cal.App.5th at p. 628.)

On December 6, 2021, following modification of the opinion and denial of rehearing, the petition for review was filed in the above captioned matter. On January 5, 2021, the petition was granted. Thereafter, the Court refined the issue presented.

ARGUMENT

I. ENDING THE COMMITMENT PERIOD BY COURT ORDER PROMOTES THE COMPREHENSIVE AND ORDERLY PROCESS FOR RESTORATION TO COMPETENCE AS ENVISIONED BY THE LEGISLATURE.

By the hearing on the motion to dismiss in March 2021, petitioner Rodriguez was committed for approximately 26 months without finding of restored to competence pursuant to sections 1370 and 1372. (Pet. Exhibit 5, at p. 41.) Marc Carr was committed for 39 months by the time his counsel successfully moved for release after finding of not restored within the then applicable three-year limitation period. (*Carr II, supra,* 59 Cal.App.5th at pp. 1140-1141.) Jose Medina never got a restoration hearing, let alone transportation to DSH, but his counsel moved to dismiss after 13 months commitment and renewed that motion 11 months later. (*Medina*, *supra,* 65 Cal.App.5th at p. 1210-1212.)

The delays suffered by each petitioner are "inherently more capable of abuse and oppressive prejudice to the criminal defendant." (*United States v. Pallan* (9th Cir. 1978) 571 F.2d 497, 499.) But petitioner Rodriguez' commitment period alone was unfairly tolled when he moved to dismiss, then terminated retroactively when he sought extraordinary review, in violation of the statutory and "constitutional principles which control [such] case[s]." (*In re Davis*, *supra,* 8 Cal.3d. at p. 805.) Those principles justify reversal of the Court of Appeal's decision on *de novo* review to correct the violation of statutory and constitutional rights. (See *People v. Rells* (2000) 22 Cal.4th 860, 868 [as to standard of review].)

A. For More than 100 Years the Law Has Evolved to Transfer Control of the Commitment Period to the Courts and Away from State Hospitals.

1. The Implementation of the Eighth and Fourteenth Amendments Ended Indefinite Commitments by State Court Order.

The United States Constitution permits the involuntary commitment of the incompetent to stand trial. (See *Greenwood v. United States* (1956) 350 U.S. 366, 375.) However, that commitment may not exceed "'the reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain that capacity in the foreseeable future.'" (*In re Davis, supra,* 8 Cal.3d 798, 804, quoting *Jackson v. Indiana, supra,* 406 U.S. at p. 738.) Against these constitutional principles, the Legislature has enacted the orderly and comprehensive statutory framework for treating and evaluating the incompetent to stand trial in California. (See generally, *Cooper v. Oklahoma* (1996) 517 U.S. 348, 355; *Medina v. California* (1992) 505 U.S. 437, 442-453.)

100 years prior to *Jackson* and *Davis*, there was no judicial oversight of the Superintendent of the State Hospital's determination when "sanity" was purportedly regained (save in capital cases awaiting execution via sections 3700-3704). (See generally, *In re Phyle* (1947) 30 Cal.2d 838, 844; *People v. Lindley* (1945) 26 Cal.2d 780, 788-789.) Commitment ended via powers "vested exclusively in the officers of the asylum." (*People v. Ashley* (1963) 59 Cal.2d 339, 359.) The Supreme Court had yet to interpret the Eighth and Fourteenth Amendments. (See, e.g., *Weems v. United States* (1910) 217 U.S. 349, 378.)

Not until the 1960s did the Supreme Court apply the Eighth Amendment to the States via the Fourteenth Amendment in the context of criminal and civil commitments. (See *Robinson v. California* (1962) 370 U.S. 660, 668-669, conc. opn. Douglas, J. ["While afflicted people may be confined either for treatment or for the protection of society, they are not branded as criminals."].) Competence to stand trial was defined as the "present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402, 408.) An "adequate hearing" is required. (*Pate v. Robinson* (1966) 383 U. S. 375, 383.)

In 1972, *Jackson v. Indiana*, *supra,* held that when a defendant is committed "solely on account of [his] incapacity to proceed to trial," the duration of commitment may not exceed "the reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain that capacity in the foreseeable future." (406 U.S. at p. 738.) Rejected were the State's arguments that "because the record fails to establish affirmatively that Jackson will never improve, his commitment 'until sane' is not really an indeterminate one. It is only temporary, pending possible change in his condition." (*Id.* at p. 725.)

The United States Supreme Court declined to prescribe "arbitrary time limits" on restoration to competence procedures, instead deferring to the States. (*Jackson v. Indiana*, *supra,* 406 U.S. at p. 738.) However, many States were singled out for "commit[ting] indefinitely a defendant found incompetent to stand trial until he

recovers competency." (*Id.* at p. 733.) Cited were the 1970 versions of California Penal Code sections 1370 and 1371. (*Id.* at p. 733 fn. 10.)

One year later, in *In re Davis*, *supra*, this Court acknowledged that "[i]n view of the similarities between California and Indiana procedure, it seems evident that we must adopt *Jackson*'s 'rule of reasonableness' in order to comply with the constitutional principles which controlled that case." (8 Cal.3d at p. 805.) The Court held that the petitioners "are entitled, under *Jackson*, to a prompt determination by state hospital authorities regarding the probability of their ultimate recovery." (*Id.* at p. 803.) "[I]f petitioners are making no reasonable progress toward that goal, they must be released or held subject to alternative commitment procedures." (*Id.* at p. 806.) As then envisioned, release would occur via habeas corpus. (*Id.* at p. 805.)

Like the Supreme Court, this Court declined to set "fixed limit[s] on the time a defendant could be committed for determining competence." (*In re Davis, supra*, 8 Cal.3d at p. 805.) The Court defined the reasonableness of the commitment depending on "the nature of the offense charged, the likely penalty or range of punishment for the offense, and the length of time the person has already been confined." (*Id.* at p. 807.) Violation of the rule of reasonableness required that the "defendant must either be released or recommitted under alternative commitment procedures." (*Id.* at p. 801.) "The trial court necessarily must exercise sound discretion in deciding whether, in a particular case, sufficient progress is being made to justify continued commitment pending trial." (*Id.* at p. 807.)

2. The Implementation of the Statutory Commitment Period Requires Court Orders.

Guided by *Davis* and *Jackson*, in 1974, the Legislature limited the commitment period to three years in former section 1370, subdivision (c)(1). Assembly Bill No. 1529 amended section 1372 to provide for a bail hearing upon termination of commitment. (Stats. 1974, ch. 1511, § 8 [AB 1529];[4] see also Stats. 1974, ch. 1423 [SB 2249].[5]) Section 1370 was amended to include the "no substantial likelihood" of restoration provision requiring notice to counsel and the court pursuant to subdivision (b)(1)(A). Only one restoration of competence hearing was authorized after 18-months of commitment as enacted in then subdivision (b)(2). In 1980, the Legislature added subdivision (a) to section 1372 so that the State Hospital, or other treatment facility, could certify that the defendant regained mental competence. (Stats. 1980, ch. 547, § 14.[6])

Some 44 years later, in 2018, the commitment period was shortened by one year via SB 1187.[7] (Senate Floor Analyses of SB

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[4] Found at: https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1973/Volumes/7374vol1_2ahr.PDF

[5] Found at: https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1973/Volumes/734shr.PDF

[6] Found at: https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1979/Volumes/7980vol1_2ahr.PDF

[7] In the meantime, the 1998 amendments made the statutes gender-neutral. (Stats. 1998, ch. 932, § 40.) The 2014 amendments added revocation proceedings. (Stats. 2014, ch. 759, § 3.)

1187 (August 28, 2018) at pp. 1-2.[8]) California was thereby brought in line with States requiring two years or less for commitment as not restored to competence.[9] Rejected were the commitment schemes tethered only to the rule of reasonableness, or renewal of the period up to maximum sentence, such as in Alabama, Louisiana, and Mississippi.[10] The California Legislature also "allow[ed] a person committed to a facility pending the return of mental competence to earn credits." (Senate Floor Analysis of SB 1187 (August 28, 2018) at p. 1; see also § 1375.5, subd. (c).)

In July 2021, the Legislature passed AB 133, which expanded custodial treatment options. (See Senate Floor Analysis of AB 133

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[8] Found at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1187.

[9] One year commitment periods or less are utilized in Alaska, Arkansas, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, New Hampshire, Ohio, West Virginia, and Wisconsin. (See Alaska Stats § 12.47.100-110; Ark. Code Ann. § 5-2-301 to 311; Ga. Code Ann. § 17-7-130; *Echols v. State*, 255 S.E.2d. 92 (Ga. Ct. App. 1979); Idaho Code Ann. § 18- 210 to 212; 725 Ill. Comp. Stat. 5/104-11 to 104- 23; Ind. Code § 35-36-3 to 4; Iowa Code § 812.3 to 812.9; Kan. Crim. Proc. Code Ann. § 22-3301 to 3306; Me. Rev. Stat. Ann. tit. 15, § 101-B; *State v. Lewis*, 584 A.2d 622 (Me. 1990); N.H. Rev. Stat. Ann. § 135:17; Ohio Rev. Code Ann § 2945.37-39; W. Va. Code § 27-6A-1 to 5; and Wis. Stat. § 971.13.) Two years or less are utilized by Arizona, California, Connecticut, Michigan, and Oklahoma. (See Ariz. Rev. Stat. § 13-4501 to 17; Penal Code § 1367 to 1376; Conn. Gen Stat. § 54-54 to 56d; Mich. Comp. Laws § 330.2020 to 330.2044; and Okla.Stat. tit. 22, § 1175.1 to 1175.8.)

[10] Al. Code of Crim. Pro. §§ 11.1-11.8; La. Code Crim. Proc. Ann. art. 641-649; and Miss. Rules of Criminal Proc., Rules 12.1-12.6.

(July 15, 2021), at pp. 1-2.[11]) A certificate of restored to competence may issue after jailhouse evaluations pursuant to Welfare and Institutions Code section 4335.2, as incorporated in amended sections 1370 and 1372. (Stats. 2021, ch. 143, § 345. (AB 133) Effective July 27, 2021.) But the Legislature did not bestow DSH with the power to "toll" or "terminate" the commitment period. (See Senate Analysis for AB 133 (July 15, 2021) at p. 14.)

In October 2021, SB 317 corrected flaws in section 4019 concerning "the application of conduct credits to persons confined in a state hospital or other mental health treatment facility pending their return of mental competency."[12] (Legis. Counsel's Dig., Sen. Bill No. 317 (2021–2022 Reg. Sess.) Stats. 2021, ch. 599.[13]) In doing so, the Legislature recognized that the certificate of restoration only authorizes that "*the defendant be returned to court*." (Senate Floor Analysis of SB 317 (September 7, 2021), at p. 3, citation omitted and emphasis added.[14]) Adopted was the reasoning of *Carr II* - issued some eight months prior - because "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent

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[11] Found at: https://leginfo.legislature.ca.gov/faces/billAnalysis Client.xhtml?bill_id=202120220AB133#

[12] Litigation over the retroactive application of the new credit scheme has already reached this Court. (See *People v. Orellana* (2022) 74 Cal.App.5th 319, petition for review filed in Case No. S273445].)

[13] Found at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml? bill_id=202120220SB317

[14] Found at: https://leginfo.legislature.ca.gov/faces/billAnalysis Client.xhtml?bill_id=202120220SB317#

specific." (*Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection* (1986) 474 U.S. 494, 501, citation omitted.)

3. The Commitment Period Coincides with the Constitutional Rule of Reasonableness.

Today, after the defendant is found incompetent to stand trial, he or she is committed pursuant to section 1370 (mental illness) or 1370.1 (developmental disability). (*Rells, supra,* 22 Cal.4th at pp. 865-866.) Progress toward competence must be reported within 90 days, then six-month intervals thereafter. (§ 1370, subd. (b)(1).) If a statutorily designated health official believes that the committed person has been restored to competence, that official must "immediately certify that fact to the court by filing a certificate of restoration with the court. . . ." (§ 1372, subd. (a)(1).) Otherwise,

> [a]t the end of two years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter, but no later than 90 days prior to the expiration of the defendant's term of commitment, a defendant who has not recovered mental competence shall be returned to the committing court, and custody of the defendant shall be transferred without delay to the committing county and shall remain with the county until further order of the court. The court shall not order the defendant returned to the custody of the State Department of State Hospitals under the same commitment.

(§ 1370, subd. (c)(1).)

There are then "further proceedings." (§ 1372, subd.

(a)(3)(A).) The court notifies the designated mental health officials "of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence." (§ 1372, subd. (c).) "[T]he numerous references in that statute to a hearing indicate a legislative intention that such a hearing be afforded." (*People v. Murrell* (1987) 196 Cal.App.3d 822, 826; see also *Rells, supra,* 22 Cal.4th at pp. 867-868.) Afterwards, "[i]f the committing court approves the certificate of restoration to competence as to a person in custody, the court shall hold a hearing to determine whether the person is entitled to be admitted to bail or released on own recognizance status pending conclusion of the proceedings." (§ 1372, subd. (d).) Alternatively, [i]f

> the criminal action against the defendant is dismissed, the defendant shall be released from commitment ordered under this section, but without prejudice to the initiation of proceedings that may be appropriate under the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code).

(§ 1370, subd. (e).)

Commitments may thereby end by judicial finding without restoration certificate, such as when the court is presented substantial evidence of competence, "except that a presumption of competency shall not apply and a hearing shall be held to determine whether competency has been restored." (§ 1370, subd. (a)(1)(G).) If DSH is not treating the committed person, the courts must order their return to County for further orders. (§ 1372, subd. (b)(4).) Before or after a certificate issues, court order may end the commitment period because a "criminal action remains subject to dismissal pursuant to

Section 1385." (§ 1370, subd. (d).)

Notably, sections 1370 and 1372 do not provide for tolling, termination, or continuance by good cause of the commitment period, as in other special proceedings. (See, e.g., *Conservatorship of MM* (2019) 39 Cal.App. 5th 496, 500; § 1600.5 [MDSO]; § 1026.5 [NGI]; and § 2972 [MDO]; see also *J.J. v. Superior Court* (2021) 65 Cal.App.5th 222, 225 [juvenile].) The omission of such provisions is the most reliable indicator that no such powers are transferable to DSH. (See generally, *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103; and *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365-366.) The statutory language thereby rejects the "faulty premise that a certification of competency, not a court finding, terminates the statutory commitment period." (*Carr II, supra,* 59 Cal.App.5th at p. 1142.) "In no event can any defendant be committed longer than [two] years under th[e] statutory scheme." (*People v. Bye* (1981) 116 Cal.App.3d 569, 577.)

4. Ending the Commitment Period by Court Order Prevents Violations of Fundamental Rights by the Department of State Hospitals.

The Legislature reduced the commitment period with knowledge that, "instead of being promptly admitted to DSH or DDS, these defendants often remain in county jails for extended periods of time while awaiting transfer." (*Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691, 694.) "These delays have continued for many years, despite previous court orders and defendants' own attempts to reduce them." (*Ibid.*) As a result, DSH has

> systematically violated the due process rights of all IST defendants in California by failing to commence

> substantive services designed to return those defendants to competency within 28 days of service of the transfer of responsibility document, which is the date of service of the commitment packet for all defendants committed to DSH and the date of service of the order of commitment for all defendants committed to DDS.

(*Id.* at p. 695.)

Judicial effort to correct DSH delays began in earnest more than a decade ago. (See *In re Mille* (2010) 182 Cal.App.4th 635, 640; see also *In re Williams* (2014) 228 Cal.App.4th 989, 1013–1015.) In 2016, DSH was held to standing transportation orders. (See *In re Loveton* (2016) 244 Cal.App.4th 1025, 1028.) Monetary sanctions were imposed for violation of transportation orders in 2019. (*People v. Hooper* (2019) 40 Cal.App.5th 685, 700–701; and *People v. Kareem A.* (2020) 46 Cal.App.5th 58, 68.) Sanctions were affirmed on a statewide basis in 2021. (See *People v. Aguirre* (2021) 64 Cal.App.5th 652, 655; and *Stiavetti*, *supra,* 65 Cal.App.5th at pp. 737-738.)

DSH has "nevertheless continued not to admit IST defendants in a timely manner, leaving them to languish in county jail." (*Kareem A., supra,* 46 Cal.App.5th 58, 64.) DSH has submitted "sham" certificate that later proved out as an attempt to "circumvent the court's placement order." (Compare *Carr I, supra*, 11 Cal.App.5th at p. 272; with *Carr II, supra*, 59 Cal.App.5th at p. 1141.) The Legislature was aware of these problems when amending section 1370, subdivision (c)(1), to reduce the limitation period to two years because lengthier commitments are unnecessary:

> Over the past half-century, medication-treatment of severely mentally ill individuals has advanced,

> competency restoration treatment programs have been shown to have consistently high success rates, and we have learned that committed persons attain competency in time periods far shorter than what was considered 'reasonable' in 1974. Studies show that the vast majority (80-90%) becomes trial-competent within six months of starting treatment, and nearly all who attain competency do so within a year.

(Assembly Floor Analysis of SB 1187 (August 23, 2018) at p. 4.[15])

The Legislature did not amend sections 1370 and 1372 to grant DSH control over the "IST defendants' fundamental right to liberty, given that they have not been convicted of any crime and their incarceration is not intended to be punishment." (*Stiavetti*, *supra,* 65 Cal.App.5th at p. 725, citations omitted.) Nor would such a delegation of power over fundamental rights pass constitutional muster because DSH "has not done enough to warrant continuous excusal from abiding by the court's commitment orders, especially given that violation of the court's orders means a violation of IST defendants' constitutional and statutory rights." (*Kareem A., supra*, 46 Cal.App.5th at p. 79.) Court orders must end the commitment period upon finding of restored, or not, to competence to avoid further constitutional violations if all "time in custody is not counted toward the maximum commitment period." (*Medina, supra,* 65 Cal.App.5th at p. 1230.)

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[15] Found at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1187#

B. The Commitment Period May Not Be Evaded by Certificate of Restored to Competence.

"The Penal Code vests the trial court with the responsibility to determine whether a criminal defendant found incompetent to stand trial and committed for treatment and competency training has been restored to competency." (*Carr II, supra,* 59 Cal App.5th at p. 1140.) Amendments to sections 1370 and 1372 transferred control of the commitment period to the judiciary while placing limits on DSH. (See, *supra,* Argument I.A.) The case law demonstrates that judicial orders not only end, but enforce, the commitment period based on finding of restored, or not, to competence. (*In re Davis, supra,* 8 Cal.3d at p. 806.)

For instance, the convoluted history of *Jackson v. Superior Court, supra,* proves that court orders must end the commitment period. Patrick Lowell Jackson was charged in Riverside County before a doubt was declared. (4 Cal.5th at p. 102.) Thereafter, he was arrested in San Bernardino County, a doubt was declared, competence purportedly restored, and he pleaded guilty.[16] (*Id.* at p. 103.) He was returned to Riverside County where competence proceedings resumed. (*Ibid.*) When conservatorship proceedings stalled, Jackson was released, before charges were refiled via indictment, the original complaint was dismissed, and another doubt declared before arraignment. (*Ibid.*)

Review was granted "to determine whether the prosecution can initiate a new competency proceeding by dismissing the original

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[16] The finding of restored to competence was later reversed in *People v. Jackson* (2018) 22 Cal.App.5th 374.

complaint and proceeding on a new charging document after an incompetent defendant has reached the maximum period of commitment provided for under section 1370(c)." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 103.) This Court rejected the argument "that because [Jackson] had already been committed for the three years [as then] authorized by section 1370(c), the trial court was without power to order his rearrest notwithstanding the prosecution's authority to dismiss and refile charges under section 1387." (*Id.* at p. 100.) Section 1387 was interpreted as permitting the dismissal and refiling of charges because "the Legislature did not understand section 1370(c)'s three-year period of commitment to be a categorical bar to further criminal proceedings." (*Id*. at p. 104.) As a result, the superior court's orders ending the commitment and granting Jackson's release were affirmed, albeit as was the order permitting the refiling of charges. (*Id.* at p. 103.)

Here, the question of refiling of charges is premature without further court orders finding petitioner restored, or not, to competence. Sections 1370 and 1372 require these court findings within "[t]he [two]-year maximum in section 1370(c) [that] protect[s] defendants' due process and equal protection rights not to be committed solely because of incompetence for longer than is reasonable." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 105, citation omitted.) Only then, can petitioner Rodriguez, like Patrick Jackson, seek bail via section 1372, subdivision (d).

Rells, supra, 22 Cal.4th at p. 866 sets out how sections 1368-1372 interplay via court orders. Section 1372 sets "forth procedures for a hearing on the defendant's recovery of mental competence

identical to those for a trial of his mental competence in the first place." (*Ibid.*) Section 1372 does not establish "expressly, a presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise." (*Ibid.*) But in light of section 1369, this Court found that section 1372 "does so impliedly." (*Ibid.*) Thus, as to the burden of proof at the restoration hearing, "section 1372 allows its gap to be filled by Penal Code section 1369." (*Id.* at p. 865.)

The same analysis restricts the commitment period for finding of restored to competence to two years via court orders bridging any gaps between section 1370, subdivision (c)-(e) and 1372, subdivisions (c)-(d), amongst other provisions. For instance, after a certificate is filed pursuant to section 1370, the committed person is returned to Court "separately and independently of any role that either official or certificate may subsequently play." (*Rells, supra*, 22 Cal.4th at p. 866.) Then, via section 1372, a court finding of restored, or not, to competence is statutorily and constitutionally required within the commitment period to preserve fundamental rights based on little more than "evidence [that] is in equipoise. . . ." (*Id.* at p. 867, quoting *Medina v. California, supra*, 505 U.S. at p. 449, ellipsis in original.)

Statutorily, petitioner may be committed "only for a period not exceeding the remaining balance, if any, of the [two] years authorized by section 1370(c)." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 100.) Constitutionally, he "can be held only for a reasonable time pending the new competency hearing." (*Id.* at p. 107.) Both protections restrict the commitment period via court order of restored to competence, or not, "during the pendency of [the] action

and prior to judgment." (*Id.* at p. 105, quoting § 1368, subd. (a).)

In this manner, enforcement of the commitment period by court order promotes restoration of competence as necessary for criminal proceedings to resume, perhaps after "charges are dismissed and refiled." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106.) To the contrary, terminating, tolling, or continuing the commitment period by the filing of a certificate of restored to competence circumvents judicial control over continuing treatment, bail, dismissal, refiling of charges, and conservatorship within the "balance of the time remaining under section 1370(c), if any." (*Ibid.*) "Nothing in section 1370(c), its surrounding provisions, or its legislative history suggests that the Legislature intended to allow the statute's [two]-year limit on commitment to be so easily evaded." (*Ibid.*)

C. The Special Jurisdiction for the Statutory Commitment Period Ends by Court Finding of Restored, or Not, to Competence.

Competence proceedings are authorized by special jurisdiction pursuant to Code of Civil Procedure sections 21 and 23. (See *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 725; and *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 490.) As such, the proceedings are governed by statutory procedures and remedies. (*Id.* at pp. 490-491.) Here, jurisdiction for restoration to competence proceeding is authorized by sections 1368-1372. (See *People v. Marks* (1988) 45 Cal.3d 1335, 1337; *People v. Hale* (1988) 44 Cal.3d 531, 541.)

Those like petitioner who have been committed pursuant to section 1370, and returned via certificate of restored to competence,

cannot resume criminal proceedings without further court orders pursuant to section 1372. Specifically, resumption of criminal proceedings requires a finding of restored, or not, to competence for transfer of jurisdiction. (Accord Parker (1975) *California's New Scheme For The Commitment Of Individuals Found Incompetent To Stand Trial*, 6 Pac. L.J. 484, 492, fn. 70 ["[I]t is apparent that such must be the result because there is no authority allowing further confinement or prosecution of the criminal offense."].[17]) In other words, jurisdiction is non-transferable without judicial findings that are statutorily and constitutionally required to ensure that the committed person can "perform the functions which 'are essential to the fairness and accuracy of a criminal proceeding.'" (*Pouncey v. United States* (D.C.Cir. 1965) 349 F.2d 699, 701, citation omitted.)

For instance, in *In re Polk* (1999) 71 Cal.App.4th 1230, 1233-1235, the defendant was found restored to competence before the case was dismissed. The prosecution refiled and another doubt was declared leading to finding of not restored to competence. (*Id.* at 1239.) DSH found that Kevin Polk's commitment period expired and recommended conservatorship. (*Ibid.*) Instead, the superior court ordered him back to the hospital. (*Ibid.*)

The Court of Appeal reversed in "compliance with the dictates of the California Supreme Court in *In re Davis* regarding the amount of time a defendant could be committed solely for incompetency to stand trial." (*Polk, supra,* 71 Cal.App.4th at p. 1238.) Jurisdictionally, the law "dictates three years as the outside limit for

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[17] Found at: https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1954&context=mlr

commitments under section 1367." (*Ibid.*) By ending commitment by remand for conservatorship proceedings, the Court of Appeal demonstrated by court order "that the most reasonable interpretation of the three-year limit is that it refers to the aggregate of all commitments on the same charges."[18] (*Ibid*, footnote omitted.)

The jurisdictional limits set by court order were reenforced in *In re Taitano* (2017) 13 Cal.App.5th 233, 256, where the defendant was returned by DSH as unlikely to be restored to competence. Conservatorship was declined, but the defendant was not released after the commitment period elapsed. (*Id.* at p. 245.) The prosecution sought a hearing outside the period, and appealed when that was denied. (*Id*. at p. 247.)

The Court of Appeal found that "section 1370 does not itself authorize the trial court to hold a competency hearing in the circumstances faced by Taitano." (*Taitano, supra,* 13 Cal.App.5th. at p. 250.) Since Taitano had "served the maximum term of commitment under the terms of the statute, he [could not] be confined any longer." (*Id.* at p. 252.) Court orders were required to end his commitment, including under section 1370, subdivision (d), which "applies not only to the point at which the defendant has fulfilled the maximum commitment period, but to earlier times during the defendant's commitment period as well." (*Id.* at p. 254.)

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[18] Notably, the Court of Appeal hinted that court orders could precede the "three-year limit in section 1370 [that] has been criticized by commentators as being longer than the 'reasonable' time period specified in *Jackson, supra*, 406 U.S. at page 738." (*Polk, supra,* 71 Cal.App.4h at p. 1238 fn. 3, citing Morris & Meloy (1993) *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. Davis L.Rev. 1, 24.)

Justice Terence Bruiniers concurred and dissented,[19] but made "clear that the Legislature did not intend a commitment facility to have the final word on a committed defendant's competence." (*Taitano, supra,* 13 Cal.App.5th at p. 257.) The majority responded: "[T]he statutory scheme reflects a legislative intent that the trier of fact will be the ultimate decision maker when the statute says it will be the ultimate decision maker." (*Id.* at p. 253.) Here, nothing in sections 1370 and 1372 provides for DSH to be the "trier of fact" as to the commitment period, which would be unwise because "DSH resembles a party far more than it resembles one 'not directly involved' in an action." (*Hooper, supra,* 40 Cal.App.5th at p. 693.)

In *People v. Quiroz* (2016) 244 Cal.App.4th 1371, 1375, the defendant was also found unlikely to regain competence. The prosecution was erroneously granted a hearing outside the two-year limitation period, where Quiroz was found competent. (*Id.* at p. 1376.) He later pleaded guilty. (*Id.* at p. 1377.) Vacating the judgment, the Court of Appeal held that the statutes did not

> authorize a trial court to convene a new competency hearing upon the prosecution's request when the hospital returns the defendant from commitment at the end of three years or upon the hospital's finding of no substantial likelihood of regaining competency to stand trial.

(*Id.* at p. 1380.)

This Court has rejected the notion that under *Quiroz* "no further proceedings of any kind are permitted once a defendant has

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[19] The Justice's concerns about refiling of charges were resolved by *Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106.

been committed for three years." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106.) For instance, *Quiroz* is "not applicable where there is a statutory basis for holding a competency hearing." (*Ibid.*) Here, there is a statutory basis for a hearing pursuant to the comprehensive operation of sections 1370 and 1372. But the lack of court findings within the commitment period has denied petitioner the opportunity to exercise personal rights, including bail.

While committed, petitioner Rodriguez is entitled to additional statutory and constitutional protections, like Victor Quiroz whose conviction was overturned because of the violation of his rights as a committed person. (*Quiroz, supra,* 244 Cal.App.4th at p. 1380.) Patrick Jackson, unlike petitioner Rodriguez, was "not being held solely (or even partially) on account of his or her incompetence; *that person [wa]s being held pending admission to bail*." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106, emphasis added.) For those who cannot access bail without finding of restored to competency, strict application of the commitment period is necessary to avoid the fate of Jordan Taitano; who died during the pendency of the prosecution's appeal proving that his indefinite commitment was unlawful. (*Taitano, supra,* 13 Cal.App.5th at 256 fn. 10.)

Petitioner Rodriguez is currently committed to the jail solely (not even partially) because of the lack of finding of restored to competence. Without such order within the narrowly tailored, but strictly enforced, commitment period, petitioner has been unreasonably denied the statutory process "for the purpose of assessing whether [he] is likely to gain competence and, if so, for treatment to that end." (*Jackson v. Superior Court, supra,* 4

Cal.5th at pp. 100–101.) Petitioner's continuing commitment without finding of restored, or not, to competence violates the statutory limitation on "determining or restoring competence to no more than [two] years." (*Id.* at p. 106.)

II. ENDING THE COMMITMENT PERIOD BY JUDICIAL ORDER ENFORCES THE STATUTORY PROCESS WITHIN THE CONSTITUTIONAL RULE OF REASONABLENESS.

A. The Commitment Period May Not Be Tolled or Terminated so as to Leave Fundamental Rights and Progress Toward Competence in Legal Limbo.

The Sixth District found that "on different facts, due process considerations may compel a different result." (*Rodriguez, supra*, 70 Cal.App.4th at p. 653, citation omitted.) But between 2020-2021, petitioner Rodriguez was committed to the Santa Clara County Jail without court hearings necessary for finding of restored, or not, to competency, much like in 1972 when Theon Jackson was indefinitely committed for more than six months in Indiana. (*Jackson v. Indiana*, *supra,* 406 U.S. at pp. 717-718.) Or, in 1973, when Eugene Davis was stuck for eight months at Camarillo State Hospital without judicial oversight. (*In re Davis*, *supra,* 8 Cal.3d at p. 802.) Each of the petitioners were deprived of "any 'formal commitment proceedings addressed to [their] ability to function in society,' or to society's interest in [their] restraint, or to the State's ability to aid [them] in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment." (*Id.* at p. 738.) Then, as now, the rule of reasonableness must be strictly enforced to end the commitment period when sufficient progress is not "being

made to justify continued commitment pending trial." (*In re Davis, supra,* 8 Cal.3d at p. 807.)

No reasonableness finding justified the lack of petitioner's restoration between the second commitment on May 16, 2019 and return to court on January 24, 2020. (IR Exhibits 10-11 and 14-15.) Petitioner was then denied the reasonable opportunity to challenge DSH's certificate between September 2020 and March 2021, during which time hearings were continued without appearances of counsel nor issuance of minute orders. (Pet. Exhibits 8-10.) Not until March 2021 did the superior court find that the commitment period tolled all the way back to the filing of the certificate of restored to competency in January 2020, some 438 days prior. (Pet. Exhibit 6, at p. 72.)

When the certificate was executed, the certifying doctor stated: "It is important that [petitioner] remain on his medication for his own personal benefit and to enable him to be certified under Section 1372 of the Penal Code." (Attachment A to Motion for Judicial Notice [Filed November 9, 2021].) Meaning, as trial counsel argued, that petitioner "has to keep taking his medication or he will not remain competent." (Pet. Exhibit 6, at pp 62.) Thus, contrary to the finding by the Sixth District, there is evidence that delays in finding of restored to competence impact petitioner's "treatment for the purpose of restoring his competence." (*Rodriguez, supra*, 70 Cal.App.4th at p. 652.) Indeed, his placement on suicide watch the weekend before the hearing on the motion to dismiss is "sufficient doubt of his competence to stand trial to require further inquiry on the question." (*Drope v. Missouri* (1975) 420 U.S. 162, 180.)

Like the statutory two-year commitment period, the

constitutional rule of reasonableness should have been strictly enforced in petitioner's case far earlier in "reference to the dates of the trial court's orders on competence." (*Rodriguez, supra*, 70 Cal.App.4th at p. 643 n. 9.) Enforcement of such rights by court order is how the restoration to competency process works in federal court. (See *Greenwood, supra,* 350 U. S., at p. 373; see also U.C.M.J. § 876b.) "[T]he district court - and the district court alone - determine[s] that 'the defendant's mental condition has not so improved as to permit the proceedings to go forward.'"[20] (*United States v. Brennan* (2019) 928 F.3d 210, 216-217, quoting 18 U.S.C. § 4241(d).) "Such mandatory, limited commitment comports with the due process principles articulated in *Jackson v. Indiana*. . . ." (*Id.* at p. 217.)

In California, the Legislature has pinned the statutory "rule of reasonableness" for commitment at two years without continuance, tolling, or termination by DSH. (Assembly Floor Analysis of SB 1187

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[20] District courts make an initial determination as to incompetence, then commit "the defendant to the custody of the Attorney General." (18 U.S.C. § 4241(d).) The examination period be limited to "a *reasonable period*, but not to exceed thirty days." (18 U.S.C. § 4247(b), emphasis added.) The director of the facility to which the defendant is committed "may apply for a *reasonable* extension, but not to exceed fifteen days." (*Ibid*, emphasis added.) Upon court order, the Attorney General for the United States hospitalizes the defendant "for such a *reasonable period of time*, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward." (18 U.S.C. § 4241(d)(1).) "[I]n the event the court determines that the defendant has not so improved, he is referred for possible civil commitment proceedings...." (*United States v. Magassouba* (2d Cir. 2008) 544 F.3d 387, 406.)

(August 23, 2018) at p. 4.) But constitutional rights must be enforced by the courts to facilitate the statutory process. (See *Jackson v. Superior Court, supra*, 4 Cal.5th at p. 106 ["Although the Legislature's judgment does not conclusively establish the boundaries of constitutional reasonableness, it does indicate that the Legislature did not intend for the trial court to ignore the fact of the defendant's prior commitment should charges be refiled."].) Ending the commitment only upon court orders within the calculable statutory commitment period, and reenforcing those orders via the constitutional rule of reasonableness, enables lawyers and "medical professionals to accurately determine whether a criminal defendant is restorable to mental competency." (*United States v. Strong* (9th Cir. 2007) 489 F.3d 1055, 1062; see, e.g., *United States v. Ferro* (8th Cir. 2003) 321 F.3d 756, 762.) The judiciary thereby promotes the orderly and comprehensive statutory framework, while protecting constitutional rights, in a manner that

> moves people through the competency process quickly[,] increases the speed at which competent people are brought to trial, increases the percentage of incompetent people who can be restored and thus brought to trial, and reduces the amount of money that the public spends incarcerating people.

(*Trueblood v. Wash. State Dep't of Soc. & Health Servs.* (W.D. Wash. 2015) 101 F.Supp.3d 1010, 1023.)

B. The Committed Are Deprived of a Reasonable Opportunity to Challenge the Certificate of Restored to Competence if the Commitment Period Ends Without Court Order.

DSH's deference to later court "certifi[cation] under section 1372 of the Penal Code" (Pet. Exhibit 6, at p. 63) demonstrates "that the filing of a certificate of competency did not terminate the defendant's commitment so as to prevent the [two]-year maximum commitment term from accruing." (*Rodriguez, supra*, 70 Cal.App.4th at p. 652, quoting *Carr II,* 59 Cal.App.5th at p. 1140.) The statutorily required court orders end the commitment period after the defense has "a reasonable opportunity to demonstrate that [the committed person] is not competent to stand trial." (*Medina v. California, supra,* 505 U.S. at p. 451.) Otherwise, the commitment violates due process, equal protection, and proscriptions on cruel and unusual punishment that can be prevented with the effective assistance of counsel. (See, *Jackson v. Indiana*, *supra,* 406 U.S. at p. 738; and *In re Davis, supra*, 8 Cal.3d at p. 805.)

Consider that petitioner's restoration certificate required subsequent judicial endorsement. (*Rells, supra,* 22 Cal.4th at p. 868.) Because further court orders are required, the ministerial act of filing a certificate does not restore competency.[21] (See generally, Evid.

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[21] In particular, defense services are required when DSH fails to conduct "symptom validity assessment[s that are] not optional." (Grant Iverson (2006) *Ethical Issues Associated with the Assessment of Exaggeration, Poor Effort, and Malingering, Applied Neuropsychology* Vol. 13, No. 2, 77, 83.) The defense may also have to explore "possible medical causes or factors, [and conduct] additional laboratory testing, imaging studies, collateral verification, or referral for neurological or psychological testing [as] may be

Code, §§ 801-802; and *Sargon v. University of Southern California* (2012) 55 Cal.4th 747, 770-73.) Indeed, judicial scrutiny may reveal that the defendant is incompetent; like Patrick Lowell Jackson who was found not restored to competency following *Jackson v. Superior Court*. (See *Jackson, supra,* 22 Cal.App.5th at p. 376.) In other words, the DSH's certificate is insubstantial evidence without judicial approval. (*Id.* at p. 382; see also *United States v. Nelson* (E.D.La. 2006) 419 F.Supp.2d 891, 902.)

"[B]ecause the issue of competency for a criminal defendant is a critical one, with constitutional implications, [it] is even more important for the court to be vigilant in disallowing unreliable psychological evidence." (*United States v. Duhon* (W.D. La. 2000) 104 F.Supp.2d 663, 677.) Terminating the commitment period by filing of the certificate of restoration rests on "simply too great an analytical gap between the data and the opinion proffered." (*General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146.) The commitment period must end by court order after hearing where there is "a reasonable opportunity to demonstrate that [the committed person] is not competent to stand trial." (*Medina, supra,* 505 U.S. at p. 451.)

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indicated." (American Association of Psychiatry and the Law (herein "AAPL") (2018 Supp.) *Practice Guideline for the Forensic Assessment,* at p. S18.)

C. Violations of the Commitment Period or the Rule of Reasonableness Warrant Conservatorship Proceedings or Dismissal of the Case.

The failure to transport after commitment violates due process. (See *Stiavetti, supra,* 65 Cal.App.5th at p. 694; see also *Mille, supra,* 182 Cal.App.4th at p. 650.) Due process and equal protection are also violated without a finding of restored, or not, to competence within the statutorily and constitutionally reasonable limits on commitment. (*In re Davis, supra,* 8 Cal.3d 798, 804, quoting *Jackson v. Indiana, supra,* 406 U.S. at p. 738.) These fundamental rights, and proscriptions on cruel and unusual punishment, cannot be protected if the commitment period is to be evaded by lack of transportation or "terminat[ion] upon the filing of the certificate of restoration." (*Rodriguez, supra*, 70 Cal.App.4th at p. 643.)

Carr II demonstrates how the Sixth District erroneously discounted time after filing of the DSH certificate as "not count[ing] toward the two-year commitment maximum under section 1370(c)(1)." (*Rodriguez, supra*, 70 Cal.App.4th at p. 653.) Marc Carr suffered delays to transport before he was certified as restored to competent while in the jail, but found not restored after the ensuing restoration hearing. (*Carr II, supra*, 59 Cal.App.5th at p. 1141.) His counsel moved for release after the maximum commitment period elapsed. (*Ibid.*) The superior court initially tolled the period to the filing date of the certificate (much like here), but wisely reversed course finding that all of the time that Mr. Carr was not restored to competency, as marked by judicial findings, "did indeed count as part of the 'commitment' for purposes of calculating [his] maximum commitment time." (*Id.* at p. 1142.)

To the contrary, the Sixth District set aside all of the time that petitioner Rodriguez spent in custody after the certificate was filed. (*Rodriguez, supra,* 70 Cal.App.4th at p. 656.) Way sided was the case law "uniformly consider[ing] the certificate of competency to be the event that triggers court proceedings to determine whether the defendant has regained competency." (*Carr II, supra*, 59 Cal.App.5th at p. 1146, citations omitted.) Nor did the Sixth District justify ending the commitment period without "hearing whereupon the court determined whether or not the defendant was competent." (*Id.* at p. 1142.) The Court thereby failed to "plac[e] an outside limit on what is statutorily and constitutionally permissible." (*Loveton, supra,* 244 Cal.App.4th at p. 1047.) The violation of the commitment period should not have been held against petitioner when it was the lower court that "was required to provide [him] a hearing whereupon the court determined whether or not [he] was competent." (*Carr II, supra,* 59 Cal.App.5th at p. 1142.)

In *Medina*, *supra,* the commitment led to a "long stand off" without transport and treatment. (65 Cal.App.5th at p. 1201.) The superior court attempted to break the stalemate by reversing the commitment order so as to hold another competence hearing. (*Ibid*.) But in doing so, the court erred because the "statutory scheme for adjudicating competence to stand trial did not grant the respondent court authority to vacate the earlier finding of incompetence and conduct another competency hearing." (*Id.* at p. 1218.) The Court of Appeal reversed and remanded with instructions to calculate "whether the maximum period of confinement has elapsed." (*Id.* at p. 1202.)

The Sixth District interpreted *Medina* as limited to the committed person who is "denied treatment to restore competence or [those] not transported to and from the treatment facility in a timely manner." (*Rodriguez, supra,* 70 Cal.App.4th at p. 653, citing *Medina, supra*, 65 Cal.App.5th at p. 1203.) But *Medina* relied on *Carr II,* where DSH evaluated the committed person and issued a certificate of restoration that proved false upon closer evaluation. (See *Medina, supra,* 65 Cal.App.5th at p. 1225, citing *Carr I, supra*, 11 Cal.App.5th at p. 272.) In both situations, the commitment period had to be enforced by court orders because counting "only days actually spent in treatment at a facility toward the maximum confinement period of [then-]three years would violate due process." (*Medina, supra,* 65 Cal.App.5th at p. 1229.)

Ultimately, *Medina, supra*, 65 Cal.App.5th at p. 1230 was remanded to account for the maximum commitment period. "If the court determine[d] that the maximum time period of commitment ha[d] elapsed, then the court must proceed pursuant to section 1370.1, subdivision (c)." (*Ibid.*) "If the respondent court determine[d] the maximum time period prescribed by former section 1370.1(c)(1)(A) ha[d] not elapsed, then the court must consider whether to dismiss the charges pursuant to section 1385 and/or the due process clause of the United States Constitution." (*Ibid.*) Either way, the commitment period must end by court order to effectuate these statutory and constitutional rights. (*Ibid.*)

Nor can defense counsel's reasonable continuances for trial count against their client's commitment period. (*Medina, supra,* 65 Cal.App.5th at p. 1230.) Within the rule of reasonableness, all

commitments must end by court finding of restored, or not, to competence after "a hearing where the defendant may challenge the medical director's certification of competence." (*Murrell, supra,* 196 Cal.App.3d at p. 826.) So continuances by counsel as necessary for effective assistance cannot be held against their client because the commitment period is "jurisdictional, and cannot be waived by counsel." (*Hale, supra*, 44 Cal.3d at p. 544.)

The failure of the lower courts to strictly apply the rule of reasonableness undermines their disagreement "with the *Carr II* court's rejection of the significance of the certification of restoration with respect to calculation of the two-year commitment period under section 1370(c)(1)." (*Rodriguez, supra*, 70 Cal.App.4th at p. 652.) The courts - not the DSH - must end the commitment period to ensure that those without the "capacity to understand the nature of the proceedings against [them] or to communicate effectively with counsel [are] constitutional[ly] protect[ed]." (*Cooper, supra,* 517 U.S. at p. 368.) Violations of sections 1370 and 1372, and/or the rule of reasonableness, must be met with conservatorship proceedings or dismissal of the charges pursuant to section 1385 to enforce the fundamental rights of the committed person. (*Medina, supra,* 65 Cal.App.5th at p. 1230; and *Carr II, supra*, 59 Cal.App.5th at p. 1146.)

III. DUE PROCESS, EQUAL PROTECTION, EFFECTIVE ASSISTANCE OF COUNSEL AND PROSCRIPTIONS ON CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY RETROACTIVE TERMINATION OF THE LIMITATION PERIOD.

Separate from the statutory question of commitment is the constitutional question of the nonarbitrary and orderly operation of sections 1370 and 1372. (See *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Proscriptions on cruel and unusual punishment are also implicated by petitioner's inability to personally exercise rights without court order. (*Medina, supra,* 65 Cal.App.5th at p. 1229.) Retroactive termination of the commitment period to a point some 19 months before the Sixth District's opinion violated fair warning and effective assistance of counsel. (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353 [recognizing when an error may not be "cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss"].) Reversal is necessary to correct the errors leading to these violations of petitioner's fundamental rights.

A. The Superior Court Erroneously Tolled the Commitment Period Based on the Filing of the Certificate of Restored to Competence.

As trial counsel correctly argued, strict enforcement of the amendments to sections 1370 and 1372 could have avoided petitioner's current state of legal limbo by tracking time from "judicial decision to judicial decision; in other words, not changes from judicial decision until a certificate of competency is filed with the court." (Pet. Exhibit 6, at p. 60.) Without marking the statutory commitment period by court order, and enforcing those orders via the

constitutional rule of reasonableness, the lower courts have "count[ed] the[] days in custody differently." (*Id.* at p. 61.) Tolling and terminating the commitment period by DSH certificate without the "opportunity for release afforded by [sections 1370 and 1372] deprive[d] petitioner of equal protection of the laws under the Fourteenth Amendment." (*Jackson v. Indiana, supra,* 406 U.S. at p. 730.)

"[T]he statutory language and the case law . . . clearly indicate that the certificate of competency serves only to initiate proceedings by which the court will hear and decide the question of the defendant's competency." (*Carr II, supra*, 59 Cal.App.5th at p. 1144.) The time limit for "commitment for the purpose of determining or restoring competence [is] no more than [two] years." (*Medina, supra,* 65 Cal.App.5th at p. 1228, citing *Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106.) Therefore, petitioner's commitment in excess of two years without finding of restored, or not, to competence implicates statutory and constitutional proscriptions on "indefinite commitments." (*Medina, supra,* 65 Cal.App.5th at p. 1228.)

Strict application of the commitment period by court order resolves the superior court's concerns about lawyers who "are not ready" for trial, perhaps even "nefariously" so. (Pet. Exhibit 6, at pp. 64-65.) Enforcement of the various deadlines in section 1370, subdivision (c)(1) - like return of the committed person more than 90 days before expiration of the two-year commitment period - provides sufficient time for prosecutors and defense counsel alike according to the Legislature. But only the courts can enforce statutory obligations by strictly applying "the '*rule of reasonableness' in a manner*

consistent with modern medical science, permitting the involuntary pre-trial involuntary confinement of a person, solely based on his or her mental incapacity to stand trial, for no longer than two years." (Assembly Floor Analysis of SB 1187 (August 23, 2018) at p. 3, emphasis added.)

Counsel and the courts also have equal duty to protect the committed person from proceeding to criminal trial as incompetent. (See, e.g., *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 574, quoting *Pate, supra,* 383 U.S. at p. 385.) So if counsel for either side act nefariously, "a trial court must always be alert to circumstances suggesting [lack of] competence to stand trial." (*Drope, supra,* 420 U.S. at p. 181.) In this function, the rule of reasonableness does not accommodate counsel, but provides the committed person with necessary "due process protection." (*Jones v. United States* (1988) 463 U.S. 354, 361; see also *Zinermon v. Burch* (1990) 494 U.S. 113, 131.)

Thus, misguided was the superior court's request for guidance as to whether "a good cause continuance is allowed or a time waiver of some kind can be entered by the lawyer." (Pet. Exhibit 6, at p. 74.) Continuances and waivers are not authorized by sections 1370 and 1372, so the courts cannot read into the statutes what has "been omitted, or omit what has been inserted." (Code Civ. Pro. § 1858; see also *Warner v. Kenny* (1946) 27 Cal. 2d 627, 629; *Gage v. Jordan* (1944) 23 Cal. 2d 794, 800.) Nor is the rule of reasonableness equivalent to "good cause" - the rule strictly prohibits unreasonable commitments based on "among other things, the nature of the offense charged, the likely penalty or range of punishment for the offense,

and the length of time the person has already been confined." (*In re Davis, supra,* 8 Cal.3d at p. 807.)

While the commitment period must be strictly enforced, defense continuances as necessary for trial coming within the rule of reasonableness coincide with the commitment period protecting the rights of the committed person; so such continuances do not count against the commitment period as ordered on remand in *Medina, supra,* 65 Cal.App.5th at p. 1228. For instance, in *Carr II* there was no basis "to infer Carr's efforts to oppose the certification contributed to his commitment exceeding the three-year maximum." (*Carr II, supra,* 59 Cal.App.5th at p. 1148.) Here as well, the superior court found that defense counsel was a "competent lawyer preparing, which is much more common, and certainly in [petitioner's] case, it's the only one relevant." (Pet. Exhibit 6, at p. 65.) In all cases, the competency of defense counsel cannot be held against the committed person whose rights are entirely dependent on an attorney "devoted solely to the interest of his client undiminished by conflicting considerations." (*People v. Corona* (1978) 80 Cal.App.3d 684, 720.)

Carr I and *Carr II* thereby demonstrate that the commitment period must be enforced in whole, not piecemeal, so that defense counsel can successfully render unconflicted, effective assistance. For instance, witness testimony may reveal the falsity of testimonial hearsay within DSH reports.[22] (See generally, *People v. Malik* (2017)

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[22] Additionally, the Competency Assessment Instrument and the Revised Competency Assessment Instrument administered by DSH have known "weaknesses includ[ing] nonstandardized administration, nonstandardized scoring, limited empirical validation, and no norms." (AAPL (2018 Supp.) *Practice Resource for the Forensic Psychiatrist*

16 Cal.App.5th 587, 590; *People v. Sanchez* (2016) 63 Cal.4th 665; and *Hemphill v. New York* (January 20, 2022) 595 U. S. ___.) Defense counsel must be able to seek hearings for such witness examination without conflicts caused by purported "waiver" of their incompetent client's "right to have the court determine his capacity to stand trial [in a timely manner]." (*Pate, supra,* 383 U.S. at p. 384.)

Thus, continuances and tolling of the commitment period by the courts, counsel, and DSH alike must be avoided because of the "serious constitutional questions [that are] fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 682.) Ending the period by court order of restored, or not, to competence promotes a healthy statutory and constitutional "scheme that makes clear it is the trial court, not a state health official, that determines whether the defendant has been restored to competence." (*Carr II, supra,* 59 Cal App.5th at p. 1145.) The commitment period must be strictly enforced by court orders "for purposes of calculating [the defendant's] maximum commitment time." (*Id.* at p. 1142.)

B. The Court of Appeal Erroneously Terminated the Commitment Period Based on the Filing of the Certificate of Restored to Competence.

The Sixth District "disagree[d] with the trial court's conclusion regarding the calculation of Rodriguez's commitment period and decide[d] that [his] commitment ended when his certification of restoration was filed." (*Rodriguez, supra*, 70 Cal.App.4th at pp. 635-636.) Supposedly, petitioner's "commitment ha[d] not exceeded two years because the commitment period is properly calculated as

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Evaluation of Competency to Stand Trial, at p. S42.)

terminating upon the filing of a certificate of restoration." (*Id.* at p. 643.) To the contrary, the commitment period terminates upon finding of restored, or not, to competence; which has yet to occur in petitioner's case. (*Medina, supra,* 65 Cal.App.5th at p. 1228, citing *Jackson v. Superior Court, supra,* 4 Cal.5th at p. 106.) Each day of his commitment to the jail without restoration finding must be counted, or we deny the reality that "[t]ime once past can never be recovered." (*People v. Simpson* (1973) 30 Cal.App.3d 177, 183.)

The two-year limitation on the commitment period pursuant to section 1370 runs until finding of restored, or not, to competence via section 1372. (*Carr II, supra,* 59 Cal.App.5th at p. 1144; and *Medina, supra*, 65 Cal.App.5th at p. 1225.) In this manner, the "gaps" between sections 1370 and 1372 leading to petitioner's current state of legal limbo can be filled, much like how this Court filled the gaps between sections 1369 and 1372. (*Rells, supra,* 22 Cal.4th at p. 868.) Such enforcement of the commitment period thwarts delay impacting the "availability of the evidence to the parties," and the "probability of the existence or nonexistence of the fact." (*Id.* at p. 881 n. 4.)

Notably, the Sixth District failed to anchor the limitations period to the hearing and orders necessary to find petitioner restored to competence, return his autonomy over fundamental rights, and resume criminal proceedings with the potential for bail. (*Carr II, supra,* 59 Cal.App.5th at pp. 1146-1147; and *Medina, supra*, 65 Cal.App.5th at p. 1230.) Instead, the Sixth District simply "disagree[d] with *Carr II* that the section 1372, subdivision (d) language referencing court approval is dispositive." (*Rodriguez, supra*, 70 Cal.App.4th at p. 652.) No effort was made to justify the

disregard for the "explicit references to a court hearing and determination of competency in section 1372, subdivision (c)." (*Carr II*, *supra,* 59 Cal.App.5th at p. 1145.)

"Nor, if the commitment terminates when a health official files a certification of competence, would any plausible purpose be served in requiring the court to approve the certification as expressly contemplated in section 1372, subdivision (d)." (*Carr II*, *supra,* 59 Cal.App.5th at p. 1145.) Court orders must end the commitment period after finding of restored, or not, to competence before "a defendant has served the maximum term of commitment, [or] due process requires that he or she be released." (*Medina, supra*, 65 Cal.App.5th at p. 1228.) Strictly applying sections 1370 and 1372 to require these findings within two years honors the constitutional "mandate of [*Davis, supra,* 8 Cal. 3d 798]." (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1480.)

Avoiding these issues, the Sixth District found that the maximum commitment period is limited to "the total period *actually spent* in commitment at a mental institution.'" (*Rodriguez, supra*, 70 Cal.App.4th at p. 648, quoting *People v. G.H.* (2014) 230 Cal.App.4th 1548, 1558, italics in original.) *G.H.* ruled upon custody credits, not the commitment period, and "cases are not authority for propositions not considered therein." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.) Moreover, *G.H.* has been abrogated to make no distinction "[w]hen a prisoner is confined in or committed to a county jail treatment facility, as defined in Section 1369.1, in proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2." (§ 4019, subd. (a)(8).) The Legislature did so because

opinions like *G.H.* unfairly resulted in

> defendants receiv[ing] only half as much custody credit as other defendants. The perverse outcome is that defendants who suffer from mental health challenges, once restored to competence, are forced to serve longer sentences than competent defendants charged with the same offense.

(Bill Summary for SB 317 from Senate Third Reading, 9/1/2021, p. 2 ["Arguments in Support"].)

The Sixth District has since held that "Senate Bill 317 does not apply retroactively and the trial court's denial of conduct credit for the time Orellana was committed to the state hospital does not violate equal protection principles." (*Orellana*, *supra,* 74 Cal.App.5th 319, Slip Opinion, at p. *2.) Supposedly, SB 317 was not passed to "mitigate or lessen the penalty for a particular crime or offense but rather facilitates the accrual of conduct credits by extending section 4019 to a group previously excluded from its provisions." (*Id.* at p. *19.) But the two classes of persons - those committed to jails and hospitals via section 1369 - are similarly situated for purposes of calculating time via sections 1370 and 1372. (Compare *Carr II, supra,* 59 Cal.App.5th 1136 with *Medina, supra,* 65 Cal.App.5th 1197.) Both classes of vulnerable people await without court finding of restored, or not, to competence as necessary to resume criminal proceedings. (See, *supra,* § I.)

Nor is the commitment period cabined to "treatment at the state hospital" because the statutes do "include a mechanism for the provision of treatment to alleviate incompetence after the certification is filed." (*Rodriguez, supra*, 70 Cal.App.4th at p. 653.) The involuntary administration of medication is such treatment. (§

1370, subds. (a)(1)(7)(A) and (a)(2)(B)(ii).) Those drugs are "designed to cause a personality change that, 'if unwanted, interferes with a person's self-autonomy, and can impair his or her ability to function in particular contexts.'" (*United States v. Ruiz-Gaxiola* (9th Cir. 2010) 623 F.3d 684, 691, citation omitted.)

Petitioner was ordered to submit to the involuntary administration of medication upon his first commitment in 2018. (IR Exhibits 2-3.) The order was renewed upon the second commitment in May 2019. (IR Exhibits 11-12.) Jail was directed to continue his medication upon discharge in January 2020. (Pet. Exhibit 6, at p. 63.) But petitioner was placed on suicide watch nearly two months after the commitment period expired; just days before his rights could be enforced at the first hearing offered in 2021. (Pet. Exhibit, at p. 62.) The commitment period must include all of these periods of time during which petitioner, as a committed person, "must rely on the authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." (*Estelle v. Gamble* (1976) 429 U.S. 97, 103.)

C. Ending the Commitment Period by Judicial Order Is Statutorily and Constitutionally Required in the Era of COVID-19.

States may temporarily restrict constitutional rights via public health orders when confronted with serious threats to public health or safety. (See, e.g., *Jacobson v. Massachusetts* (1905) 197 U.S. 11.) But when such orders have "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (*Id.* at p. 31,

citations omitted.) In terms of the mentally incompetent, "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [the committed person] with [the] treatment necessary for rehabilitation." (*Ohlinger v. Watson* (9th Cir. 1980) 652 F.2d 775, 779.) Nor can the State unilaterally waive hearings necessary to decide if "sufficient progress is being made to justify continued commitment pending trial." (*Davis, supra*, 8 Cal.3d at p. 807.)

Rodriguez was denied the most fundamental of rights - access to the courtroom - for six months during the COVID-19 Pandemic between 2020 and 2021. Hearings were continued without individualized consideration, nor finding of constitutional reasonableness, much less appearances of his counsel (who was previously trial ready within the commitment period). (Pet. Exhibit 10, at p. 102.) The Emergency Orders relied on by the lower courts did not excuse such unreasonable statutory and constitutional non-compliance because the Governor authorized a limited waiver to DSH only as to the right to *transportation*

> to ensure that patients with mental or behavioral health conditions continue to receive the services and support they need, notwithstanding disruptions caused by COVID-19; and to protect the health, safety and welfare of patients with mental or behavioral health conditions committed to the State Department of State Hospitals facilities….

(Executive Order N-35-20, at p. 2.)

The DSH's transportation waiver issued in March 2020, but expired in May 2020. (See Stephanie Clenden, Dir. (March 23, 2020) *Department Directive on Suspension of incompetent to Stand Trial Patient Admissions*.) None of the Emergency Orders issued

by this Court or the superior court suspended proceedings under section 1367-1372. (Return Exhibits 34-38.) Yet, sections 1370 and 1372 were effectively suspended in petitioner's case by tolling and termination of the commitment period via DSH certificate in "violation of [the] defendant's rights." (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 105.)

During the COVID-19 Pandemic, the lower courts should have strictly applied the commitment period to "'enforce the constitutional rights of all persons, including prisoners.'" (*Brown v. Plata* (2011) 563 U.S. 493, 511, citations omitted.) Indeed, the right to bail was reformed by this Court at the height of the Pandemic. (See *In re Humphrey* (2021) 11 Cal.5th 135.) Given that the same right to bail is at the core of section 1372, subdivision (d), court hearings and orders were particularly needed for persons committed as not restored to competence in jails that "have long been associated with inordinately high transmission probabilities for infectious diseases." (*In re Von Staich* (2020) 56 Cal.App.5th 53, 59.) Indeed, petitioner and others "with schizophrenia [are] nearly 10 times more likely to contract COVID-19 and are nearly three times more likely to die from it if they do fall ill, compared with individuals who do not have a mental illness."[23]

Instead, hearings were continued without consideration of the statutory commitment period or finding of constitutional reasonableness individualized to petitioner. (Pet. Exhibit 10.) Nor

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[23] National Institute of Mental Health (April 9, 2021) *One Year In: Covid-19 and Mental Health,* available at https://www.nimh.nih.gov/about/director/ messages/2021/one-year- in-covid-19-and- mental-health [last accessed March 2, 2022].

were petitioner and his counsel present when the Presiding Judge of the Superior Court spoke with representatives of the District Attorney's Office about local restoration proceedings. (Return Exhibit 31.[24]) No Emergency Order, statute, or construction of the rule of reasonableness permitted automatic continuances or "tolling" and "termination" of the commitment period meant to protect incompetent persons based on prioritization of "limited trial capacity and backlog for criminal jury trial that had resulted therefrom." (*Id.* at p. 14.) Judicial findings - in the courtroom with all parties present - were statutorily, constitutionally, and jurisdictionally required because "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." (*DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 199-200.)

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[24] The hearsay is not cognizable on appeal because it "involv[es] facts open to controversy which were not placed in issue or resolved by the trial court." (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 958.) Nor is the declaration relevant to an issue that may "render the dispute moot or make the remedy useless." (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 670–671.) The Sixth District erred in overruling petitioner's objections by string cite to these cases. (*Rodriguez, supra,* 70 Cal.App.5th at pp. 642-643.)

IV. RETROACTIVE TERMINATION OF THE COMMITMENT PERIOD IN VIOLATION OF PETITIONER'S FUNDAMENTAL RIGHTS REQUIRES REMAND FOR RELEASE AND DISMISSAL OF CHARGES OR CONSERVATORSHIP.

The Sixth District remanded for the superior court to "hold a hearing under section 1372, and it need not dismiss the criminal cases." (*Rodriguez, supra*, 70 Cal.App.4th at p. 636.) The remedy purportedly "promote[s] the defendant's speedy restoration to mental competence." (*Id.* at p. 652, citing § 1370, subd. (a)(1)(B)(i).) But there can be no *speedy finding* of competence without the right to demand such an order within the commitment period to avoid "the time an incompetent defendant spends in jail [that] is unnecessary and implicates not only due process, but also counts toward a finding of prolonged incarceration under the state constitutional speedy trial guarantee." (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1545.)

Nothing in and between sections 1369 and 1372 evinces a Legislative intent to retroactively terminate the commitment period based on the certificate of restored to competence. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) The statutes, like "judicial decisions[,] are reviewed under 'core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." (*People v. Sandoval* (2007) 41 Cal.4th 825, 855, citation omitted.) The retroactive termination of the commitment period by the lower courts via delegation of judicially created, non-statutory tolling and termination powers to DSH violates due process, equal protection, effective assistance of counsel, and proscriptions on cruel and

unusual punishments. The violation of such fundamental rights only expands the statutory gaps that must be filled by this Court "under the law that governs inquiry into the mental competence of a defendant in a criminal prosecution." (*Rells, supra,* 22 Cal.4th at p. 862.)

In sum, petitioner has been unreasonably committed longer than the statutory limitation period without finding of restored, or not, to competence as constitutionally required. (*Jackson v. Superior Court, supra,* 4 Cal.5th at p. 107.) Dismissal of his case, and perhaps initiation of conservatorship proceedings, is warranted based on the accrual of the maximum amount time for "all commitments on the same charges." (*Polk, supra,* 71 Cal.App.4th at p. 1238.) In all events, remand is necessary to correct the violations of sections 1370-1372; Article I, sections 7, 15, and 17 of the California Constitution; and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

SUMMATION

For the foregoing reasons, petitioner respectfully submits that the matter must be remanded with directions to grant the motion to dismiss and order release, or initiate conservatorship proceedings.

DATED: April 5, 2022

Respectfully Submitted,

/s/ B.C. McComas

BRIAN C. McCOMAS

CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, Rules 8.520(c), I hereby certify that the attached memorandum for points and authorities is written in Century725 BT in 13 point font and contains 13,463 words.

DATED: April 5, 2022

Respectfully Submitted,

/s/ B.C. McComas

BRIAN C. McCOMAS

PROOF OF SERVICE

I, Brian C. McComas, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the above referenced action. My place of employment and business address is PMB 1605, 77 Van Ness Ave., Ste. 101, San Francisco, CA 94102.

On April 5, 2022, I served the attached **PETITIONER'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof in an envelope addressed to the person named below at the address shown, and by sealing and depositing said envelope in the United States Mail in San Francisco, California, with postage thereon fully prepaid or by electronic filing:

Mario Rodriguez PFN: DRC910 Elmwood Jail 701 S Abel St., Milpitas, CA 95035	Daniel M. Mayfield Attorney At Law Carpenter and Mayfield 730 N. First Street San Jose, CA 95112

On April 5, 2022, I served the attached **PETITIONER'S OPENING BRIEF ON THE MERITS** by transmitting a PDF version of this document by electronic mailing to each of the following:

Office of the Attorney General 455 Golden Gate Ave., Ste. 11000 San Francisco, CA 94102-7004 SFAG.Docketing@doj.ca.gov Honorable Judge Eric S. Geffon C/O Clerk of the Court, Santa Clara County Superior Court 190 W Hedding St., San Jose, CA 95110 egeffon@scscourt.org	Sixth District Appellate Program 95 South Market St., Ste. 570 San Jose CA 95113 sdapattorneys@sdap.org Sixth District Court of Appeal C/O Clerk of the Court 333 W. Santa Clara, Ste. 1060 San Jose, CA 95113 Sixth.District@jud.ca.gov

Santa Clara County DA Office Appeals Division 333 W Santa Clara St #1060, San Jose, CA 95113 motions_dropbox@dao.sccgov.org Sixth District Court of Appeal C/O Clerk of the Court 333 West Santa Clara Street Suite 1060 San Jose, CA 95113 (Via Truefiling)	CPDA Diana Alicia Garrido Office of the Public Defender 800 Ferry Street Martinez, CA 94553 Diana.Garrido@pd.cccounty.us

I declare under penalty of perjury that the foregoing is true and correct. Signed on April 5, 2022 at San Francisco, California.

/s/ B.C. McComas

BRIAN C. McCOMAS

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. S.C. (PEOPLE)**
Case Number: **S272129**
Lower Court Case Number: **H049016**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Brian Mccomas The Law Office of B.C. McComas, LLP	lawofficeofb.c.mccomasllp@gmail.com	e-Serve	4/5/2022 4:14:04 PM
Stephanie Regular Contra Costa County Public Defender 210115	stephanie.regular@pd.cccounty.us	e-Serve	4/5/2022 4:14:04 PM
Honorable Judge Eric S. Geffon	egeffon@scscourt.org	e-Serve	4/5/2022 4:14:04 PM
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/5/2022

Date

/s/Brian McComas

Signature

McComas, Brian (273161)

Last Name, First Name (PNum)

Law Office of B.C. McComas

Law Firm